

Divorce: Things to Consider

A Broad Overview of Areas of Concern



***Making a difference in
the lives of Iowa women***

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Divorce: Things to Consider

This pamphlet on divorce is meant to give a broad overview of some of the areas of concern which might arise during a divorce proceeding. **IT IS BY NO MEANS COMPREHENSIVE AND SHOULD NOT BE CONSTRUED AS LEGAL ADVICE.** Divorce by its nature is personal and each case is different; therefore, it is strongly recommended that you obtain an attorney to properly represent your interests in any of the matters mentioned in this pamphlet or any others that may arise. The following is meant to give you a guide to typical areas for discussion with your attorney.

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Overview of Divorce Procedure

Iowa has what is known as a “no-fault” divorce law. This means that one party is no longer required to prove in an adversarial proceeding that the other party was “at fault” or caused the marriage breakup. Instead of proving fault, a person must simply show there has been a breakdown in the marriage relationship, the “legitimate objects of matrimony” have been destroyed, and there remains no reasonable likelihood that the marriage can be preserved. Usually, the party seeking the divorce is the only one who needs to testify if all of the issues (e.g., custody, visitation, support, property and debt division) have been resolved by a written agreement or the other spouse completely ignores the divorce action (“default”). In some situations a hearing and testimony are not required at all.

The first step in obtaining a divorce is to file a petition with the Court for “dissolution of marriage”—defined as a “termination of the marriage relationship” and synonymous with the term “divorce.” A copy of the dissolution petition and an original notice from the Clerk of Court must be given to the other spouse. Before a person can file a petition for dissolution, he or she must have resided in the state for at least one year, or the person’s spouse must be a resident of Iowa and be personally served (notified in person) in Iowa. The county in which the dissolution is filed is the one either spouse resides in.

After the petition has been filed, and the other spouse is served with (receives a copy of) the petition, a waiting period of 90 days is required before the divorce decree can be granted. This waiting period can be waived only for good cause and a showing of emergency or necessity to satisfy the Court that immediate action is required. During the 90 days, temporary orders may be obtained by either spouse that will give her or him attorney fees; temporary custody of the children; child support; alimony; or, if there has been physical abuse, the right to occupy the family home. It is also possible to get an injunction to prevent a spouse from disposing of marital property prior to the final settlement. If one spouse has harassed or physically abused the other, a temporary injunction

may be obtained to prevent these acts from recurring.

On request of either spouse, the Court will provide for a 60-day counseling period—known as conciliation—during the 90-day waiting period. The conciliator may be someone requested by the parties or one of the following: clergy, physician, public or private marriage counselor, or representatives from family service agencies or community mental health centers.

The 90-day waiting period is also used by the parties to negotiate a settlement of such matters as property ownership, child support, spousal support (alimony), and child custody. In most cases, settlements are agreed upon through this negotiation process, reduced to writing, and approved by the Court at a final hearing. In cases where the parties cannot reach an agreement, a pretrial conference is scheduled. At this pretrial conference, the parties and their attorneys meet formally at the courthouse to determine which issues the Court must resolve. If there are children, the court will order the parties to go to a class (probably will last four hours), which will discuss how children often are caught in the middle of the parents’ divorce. A trial will be scheduled sometime after the pretrial conference and at least 90 days after the petition was filed. Divorce cases are heard by a judge without a jury and generally these trials can be closed to the public if the Court finds it is in the parties’ or the child(ren)’s best interests.

Ordinarily, questions of wrongdoing and fault will not be heard. However, the question of personal fitness of each party will be considered if custody of the child(ren) is at issue. The Court may, on its own initiative or at the request of either party, appoint an impartial third attorney to represent the interests of the child(ren) at the hearing. The Court may also order that a home study or child custody evaluation be made to assist the Court in resolving the issue of child custody, or may order the parties to participate in mediation with a mediator to try to resolve the custody/visitation issue(s). In nearly every case, the parties will have to pay the costs of the home study, child custody evaluation, and mediation.

The use of mediation is increasing in Iowa. In mediation, a neutral third party (not a judge) assists the parties in talking, listening, and reaching a settlement of some or all of the issues in their case. The mediator does not give advice or make decisions. Parties are encouraged to consult an attorney so they understand the long-term legal ramifications of their options. The parties make decisions based on what is important and acceptable to both of them.

Either party can request to participate in mediation at any time, or the Court can order the parties to participate. The Court orders parties to mediation in divorce- and custody-related cases that ask the Court to make a decision. If the parties are unable to reach complete agreement in mediation, the parties can then request the Court to make a decision on any unresolved issues at a hearing or trial. Parties may request an excuse, or waiver, from mediation where there is a history of domestic violence or severe abuse.

It is important to note that not all cases are negotiated to settlement within 90 days. Some cases do take longer; however, the court administrators monitor cases and will automatically schedule a pretrial conference if the case has been on file for 120 days. Civil time standard for processing contested dissolution cases assumes they can be completed in eight months and uncontested cases in four months.

Specific Issues

Custody

In making a custody decision, the Court's paramount concern is the "best interests of the child." In deciding what is in the "best interests of the child," the Court should try to assure the opportunity for maximum continuing physical and emotional contact with both parents unless circumstances, such as harm to the child(ren), dictate otherwise. Therefore, the Court will consider joint legal custody of the child(ren) upon application of either party. In fact, if the Court denies joint legal custody, it must state its reasons for doing so. Joint legal custody does not require joint physical custody (or that each parent have equal time with the children). Joint legal custody means that both parents

have equal participation in decisions affecting the child(ren)'s legal status, medical care, education, school activities, and religious instruction. Physical custody may still be given to one parent, subject to visitation rights of the other parent. The Court will not award joint physical custody (50/50 care) if custody is in dispute, but some judges will approve joint physical care provisions if the parents have agreed to it and can show the Court they have shared joint physical care of the child(ren) during their separation, and the child(ren) have not been adversely affected.

Some of the factors the Court will look at in determining the "best interests of the child(ren)" include:

- whether each parent would be a suitable custodian for the child(ren);
 - emotional, social, moral, material and educational needs of the child(ren)
 - characteristics of each parent including age, stability, mental, and physical health
 - the interest and ability of each parent to provide for the needs of the child(ren)
 - the home environment the child(ren) would be living in
- whether the psychological and emotional needs and development of the child(ren) will suffer due to lack of active contact with and attention from both parents;
- whether the parents can communicate with each other regarding the child(ren)'s needs and each parent can support the other's relationship with the child(ren);
- whether both parents have actively cared for the child(ren) before and since the separation;
- whether the custody arrangement is in accordance with the child(ren)'s interests, or whether the child(ren) has (have) strong opposition, taking into consideration the child's age and maturity;
- whether one or both of the parents agree or are opposed to joint custody;
- the geographic proximity of the parents; and
- whether the safety of the child(ren), other children, or the other parent will be jeopardized by the awarding of joint

custody or by unsupervised or unrestricted visitation.

If there has been a history of domestic abuse, there is a presumption that joint legal custody is inappropriate.

If legal and physical custody are awarded to one parent, the other parent is usually granted visitation rights. Also, the Court will seldom separate siblings into different homes. If the noncustodial parent has abused or neglected the child(ren), the Court could provide for supervised visitations.

The Court will have looked closely at the behavior of both parents during the marriage and after their separation. Before moving out of a marital home without your child(ren), you should consult an attorney if you want custody or primary care. Once the custody determination is made by the Court, it is very difficult to change or modify the decree.

Visitation

Either general or specific visitation rights may be granted to the noncustodial parent. Again, the Court's primary concern will be what is best for the child(ren). It is usually preferable to spell out visitation rights in the agreement or decree. Parents who are trying to work out an agreement can be fairly creative in designing a visitation schedule that will fit their child(ren) and their own schedules. It is not always necessary to simply accept the "typical visitation schedule" of every other weekend, every other holiday, etc. Consideration should be given to visitation on some weekends, holidays, child(ren)'s and parent's birthdays, and school/summer vacations. Grandparents may also have visitation rights, and provisions may be included in the decree as to their exercise of these rights.

Child Support

The Court must now set child support payments according to child support guidelines established by the Supreme Court of Iowa, unless the Court determines in writing that an injustice would occur by applying the guidelines. The guidelines take into consideration both parents' net incomes and the number of children to be supported. The parent paying support may have the amount reduced if they have

"extraordinary visitation" as defined in the guidelines as more than 127 overnights per year. If requested, the Court will usually order temporary child support while the dissolution is pending.

Women as well as men will be required to pay child support to the primary custodian. Child support can be changed or modified, but it must be shown that there is a "material change of circumstance" not contemplated by the Court and the parties at the time of the decree. From a tax standpoint, child support payments are not deductible to the person paying them or taxable to the recipient.

Spousal Support

Spousal support or alimony may be awarded to either a husband or a wife. Receiving alimony is not an automatic right like child support. The Court looks at each case individually to see if alimony should be awarded. Some of the factors the Court will consider in granting alimony include:

- the length of the marriage;
- the age and physical and emotional health of the parties;
- the distribution of property;
- the educational level of each party at the time of marriage and at the time the action is commenced;
- the earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment;
- the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal;
- the tax consequences to each party;
- any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future

reciprocation or compensation by the other party;

- the provision of an antenuptial agreement; and
- other factors the Court may determine to be relevant in an individual case.

The Court can award lifetime alimony to a disabled or an older spouse whose income is significantly less than the other spouse's, and where it appears unlikely, due to age or disability, that the disadvantaged spouse will be able to significantly improve his or her financial condition.

The Court can also award rehabilitative alimony to a spouse for a shorter, defined period of time to assist that spouse in making the transition from homemaker through a schooling or training period into the work force. The Court can also award reimbursement alimony to a spouse who has made significant contributions (homemaking, child care and/or earnings) to the other spouse's advanced degree or professional license.

Typically, lifetime and rehabilitative alimony terminate when the recipient remarries or dies, but reimbursement alimony usually does not terminate upon remarriage. As a general rule, alimony payments are taxable to the recipient and deductible to the payer. If no alimony is received at the time the marriage is terminated, neither spouse can ever obtain alimony from the other in the future. Because of this rule, it may be prudent to obtain even \$1 of alimony per year so that in the event of illness or injury that would incapacitate a spouse from working, she/he could reopen the issue of the amount of alimony with the Court. Alimony, like child support, can be modified (increased, decreased or terminated) in the event of a substantial unforeseen change in circumstances not in contemplation of the Court or the parties when the decree was entered.

Property Settlements

Iowa is an "equitable distribution" state. The Court is required to make a distribution of assets and debts which is fair based upon all the facts and circumstances of each case. Equitable distribution does not always mean an equal distribution. In determining an equitable

division of the parties' assets and debts, the Court will consider:

- the property brought into the marriage by each party;
- the age and physical and emotional health of the parties;
- the length of the marriage;
- the contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care service;
- the earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage;
- the desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of any children. Or, if the parties have joint legal custody, to the party having physical care of the child(ren);
- the amount and duration of an order granting support payments to either party, and whether the property division should be in lieu of such payments;
- other economic circumstances of each party, including pension benefits, vested or unvested, and future interests;
- the tax consequences to each party;
- any written agreement made by the parties concerning property distribution;
- the provisions of any antenuptial agreement;
- other factors the Court may determine to be relevant in an individual case;
- the contribution by one party to the education, training or increased earning power of the other.

Inherited property and gifts received by either party are generally not divided between the parties, and

are considered the individual property of the recipient. However, if these assets become commingled with marital property or are dissipated in family support, it may be difficult to recover their value. Property can include things like pension plans, partnership interests, stock in professional corporations or family businesses (whether incorporated or not), life insurance cash value, IRAs and employee stock option plans, to name a few, as well as real estate, vehicles, farm machinery, livestock, grain, household goods, bank accounts, stocks and bonds. The services of other professionals, e.g., appraisers and accountants, may be required to determine the extent and value of assets, which can significantly increase the cost of a divorce action.

Debts

Determining debt liability may be more important than property division, and usually this is done as part of the equitable distribution. Sometimes, one spouse will declare bankruptcy after the divorce, but the other spouse will not do so. The creditors can, and will in many cases, attempt to collect the debts from the spouse not declaring bankruptcy. Unfortunately, the Court in a dissolution proceeding cannot prevent a creditor from collecting joint debts from either spouse. The Court can only decide which spouse is liable for the debt, as between the parties, but creditors are not bound by that decision.

Homestead

Often the parties' major asset is the equity in the home. It may be impossible for the person assuming ownership to immediately pay to the other party his or her share of the equity. Periodic payments may be arranged, or a lump sum payment may be made after sale of the house or at a future date, such as the date the youngest child reaches majority or the custodial spouse remarries. If the custodial or primary care parent can afford the house payments, often they will be allowed to remain in the home for the children's sake until the children complete high school (absent remarriage, sale of the home, etc.) before they are required to pay off the cash settlement on the home to their former spouse.

Life Insurance

Sometimes the Court will require each party to maintain a life insurance policy as guarantee of child support or alimony payments. The beneficiary may be the spouse, the children, or a trustee, since, under Iowa probate law, a minor child may not receive outright in excess of \$4,000 from inheritance. It may be difficult to determine that the required life insurance policy is being maintained after the divorce. A provision should be included in the agreement requiring annual proof of policy premiums payment and prohibiting borrowing against the policy, which would reduce its death benefit.

Health Insurance/Uninsured Medical and Dental Expenses

The Court will almost always require one parent to provide health insurance for the child(ren), which may be in addition to his/her monthly child support obligation. The child support guidelines require that the custodial parent pay the first \$250 per child per year (up to a maximum of \$500) of any uncovered medical expenses. Anything above that amount is to be paid by the parents in proportion to their respective net incomes.

College Education

Usually child support will not be awarded past a child's eighteenth birthday or completion of high school, whichever occurs last. The Court can provide for support for a child who goes on to a college or trade school or the parties may agree that both will contribute to college education costs and this agreement is enforceable. In families where college is anticipated, care should be taken that both maintain their obligation at the same level they would have maintained if the divorce had not occurred. The Court will not require parents to pay for expensive private college educations unless the parents agree to it. The Court may also require the child to contribute a certain percentage to his or her educational expenses, in addition to the parents' contributions. The Court will not require parental college or vocational educational support beyond the child's twenty-second birthday, and will require that the child be a full-time student attending a college, university or vocational school in good faith. Post-high school educational support is not to be based

upon the Child Support Guidelines, but will be set in an amount which is fair and equitable.

Removal of Children from the State

The parent who has primary physical care of the children provides their primary residence, and is thus entitled to change this residence even by moving out-of-state. Depending on the individual case, the Court can prohibit a custodial parent from moving children out-of-state without giving the other parent notice and an opportunity to request a hearing. It is generally advisable to provide for this specifically in the decree. This does not mean that the custodial or primary care parent cannot move; it does mean that the other parent would have the opportunity to request a hearing if he or she believes the move would cause specific harm to the child(ren), request a change in visitation to accommodate greater geographic distance between the parents, or ask the Court to determine who will pay the added transportation costs.

Access to Records

Both parents, regardless of who has custody, have a legal right to access to a child's medical, school and law enforcement records, unless specifically denied by a Court order.

Birth Name

A provision may be made in the divorce decree for the wife, and now in some cases the husband, to regain her/his birth name or former married name, and no other legal action is necessary. Some spouses prefer to retain their married names, so they will have the same surname as their minor child(ren).

Attorney Fees

In cases where one spouse has a significantly higher income than the other, the Court may require the former to pay the other spouse's attorney fees in the divorce proceeding. If there is a trial, these fees can be sizable and should be considered in determining the ultimate award of property.

Tax Exemptions

The IRS provides that the parent who has custody of a child for the greater part of the calendar year may claim the child as an income tax dependent if the parent provides more than half the dependent's support. The

exceptions to this rule arise when: a) parents sign a multiple support agreement; b) the custodial parent releases in writing the right to claim the exemption; or, c) there is a contrary provision in a pre-1985 decree or separation agreement. The settlement should spell out any agreements. It is also possible for the parents to split the exemptions when there is more than one child or to alternate the child as a dependent every other year. The primary custodian may want to condition waiving the exemption only if child support is fully paid. As a rule, you should consult someone well-briefed in tax aspects, since taxes are a very important part of any divorce proceeding.

Income Tax Returns

Marital status for filing income tax returns is determined on the last day of the fiscal year for each taxpayer. Anyone who files on a calendar year basis (January 1 to December 31) must file as a married person unless the divorce is final by the end of the year, or the parties have been separated for more than six months and one spouse qualifies as head of household. Provision should be made in the decree for the division of any tax refunds. Again, specific tax advice should be obtained in all tax matters.

Wills

It is advisable to review a will or write a new one during a divorce proceeding. If the spouse dies before the divorce is final, the property will be distributed as if the spouse were married, unless the will provides differently. Even if the will does not provide for a surviving spouse, if still married at the time of death, a surviving spouse may elect against the will and receive a statutory share of the property or approximately one-third of the property. If the will is not rewritten during the pendency of the divorce, it is certainly advisable to do so once the divorce is finalized. However, any bequest made to a spouse in a will written during the marriage is automatically terminated when the divorce decree is entered. Parents should consider setting up a trust fund to receive insurance proceeds and pension survivorship proceeds, in addition to other assets to be held for the benefit of the child(ren).